



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

August 3, 2022

Re: FOIA Request NLRB-2022-001669

Dear Beverly Banks (Law360):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on August 2, 2022, in which you seek the Employer's motion to take notice filed on Aug. 2, motion filed on July 19, and NLRB's RD order on rescheduling hearing filed on June 30 in *Chipotle*, Case No. 01-RC-298068. You agreed to assume financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on August 2, 2022. On August 3, 2022, your request for expedited processing was granted.

Your request is granted in part and denied in part as explained below.

Regarding the NLRB's June 30 RD order rescheduling the hearing, that record is available on the Agency's website at the following link: <https://www.nlr.gov/case/01-RC-298068>. This portion of your request is granted in full.

Regarding the remaining records, a search of the Agency's electronic casehandling system, NxGen, has been conducted. After a review, I have determined that the responsive records are part of the investigative file in an open representation case before the Agency and is exempt from disclosure pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with a pending enforcement proceeding. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Additionally, the instant representation case is related to two other NLRB unfair labor practice cases, *Chipotle*, Case Nos. 01-CA-299533 and 01-CA-299617, that are currently pending before the Agency. Given the open status of those related proceedings, Exemption 7(A) of the FOIA permits the Agency to withhold records or information from any or all related case files, even if the requested case is closed, if disclosure could reasonably be expected to interfere with the related, pending proceeding. 5 U.S.C. § 552 (b)(7)(A); See *New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 385-86 (1st Cir. 1976); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). This is because the FOIA is not

intended to function as a private discovery tool. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242. The protections of Exemption 7(A) extend to any record whose release would enable a respondent or potential respondent to tailor a defense or otherwise obtain an unfair litigation advantage by premature disclosure. See *Ehringhaus v. FTC*, 525 F. Supp. 21, 23-24 (D.D.C. 1980); *Swan v. SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996). Moreover, the protection applies until all reasonably foreseeable administrative and judicial proceedings conclude. See *Juarez v. Dep't of Justice*, 518 F.3d 54, 58-59 (D.C. Cir. 2008). Any investigatory records contained in the requested case file that may be responsive are thus protected from disclosure at this time. Consequently, FOIA Exemption 7(A) is applicable, since disclosure of the requested record at this time could interfere with the related, pending proceedings. Therefore, given the open status of the requested case and the related cases, the investigatory records in these case files are being withheld in full at this time pursuant to Exemption 7(A).

Please note that the Exemption 7(A) protection is “temporal in nature.” *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (citing *NLRB v. Robbins Tire*, 437 U.S. 214, 223-24 230-32 (1978)). As such, case file records may become disclosable, subject to applicable exemptions, after the case closes, that is, once a Board decision and/or court order issues, there has been full compliance with a settlement, or the case has otherwise been closed under Agency procedures. Accordingly, you may wish to file a new request at that time.

The status of these cases can be tracked on the Agency website at www.nlr.gov by going to the Cases & Decisions tab, clicking case search, entering the case numbers in the search box and viewing the case pages or by clicking the links here:

<https://www.nlr.gov/search/case/01-RC-298068>;
<https://www.nlr.gov/search/case/01-CA-299533>; and
<https://www.nlr.gov/search/case/01-CA-299617>.

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request.

You may contact Stephanie Hanson, the Attorney-Advisor who processed your request, at (202) 501-8648 or by email at stephanie.hanson@nlrb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlrb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:

<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

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Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer